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401 West "A" Street, Suite 2600
San Diego, CA 92101-7913
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FAX: 619.696.1410

Attorneys for Plaintiff
ATI INDUSTRIES, INC.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ATI INDUSTRIES, INC., Plaintiff, v. ART AND FRAME MART CORPORATION; DOES 1-10; and ROES 1-100, Defendants.	CASE NO. 08-CV-1296 IEG (RBB) ***AMENDED* EX PARTE APPLICATION FOR: (1) AUTHORITY TO SERVE SUBPOENA ON DEFAULTED DEFENDANT, RELIEVING PLAINTIFF OF ITS OBLIGATIONS UNDER F.R.C.P. 26(F)**

The sole defendant (a corporation) is in default for failure to respond to the Complaint within the time required by the Federal Rules of Civil Procedure. Plaintiff, ATI INDUSTRIES, INC. ("ATI"), files this *ex parte* application for an order authorizing service upon defendant and its President of the attached subpoenas, thereby permitting discovery under Federal Rules of Civil Procedure Rule 26(d) and (f) prior to ATI "formally" conferring with defendant ART AND FRAME MART CORPORATION.

ATI states in support:

(1) The Clerk of this Court entered the default of defendant ART AND FRAME MART CORPORATION on August 28, 2008. (Court Docket Document No. 9)

(2) Local Rule 55.1, requires plaintiff ATI to move for a default judgment within thirty (30) days after the entry of default was issued. But ATI needs minimal damages discovery in order to establish the principal component of damages under the copyright laws (disgorgement of defendant's infringing profits under 17 U.S.C. 504(a)) prior to moving for a default judgment in this matter.

(3) The documents needed to establish its claim for damages are simple and easily retrieved by the defendant from its records. ATI listed the documents requested in the subpoenas attached as **Exhibit A** and **Exhibit B** to this *ex parte* application. These are the categories:

1. Documents sufficient to show the names, last known addresses, telephone numbers and e-mail addresses for all entities and persons who supplied the Infringing Certificate to Art and Frame Mart Corporation.

2. Documents sufficient to show the names, last known addresses, telephone numbers and e-mail addresses for all entities and persons to whom Art and Frame Mart Corporation distributed, shipped or otherwise transferred an Infringing Certificate when it was attached to or accompanied a painting after July 20, 2005.

3. Documents sufficient to show per unit sales of paintings sold, shipped or transferred with the Infringing Certificate by Art and Frame Mart Corporation to each entity and person identified in paragraph (2) above.

4. Documents sufficient to show all revenue received from the sales, shipments or transfers of paintings identified in paragraph (3) above.

(4) Because this matter is proceeding under default procedures, the parties will not have an Early Neutral Evaluation Conference, a key step in commencing discovery in compliance with F.R.C.P. Rule 26(d) and (f) under ordinary circumstances.

(5) ATI requests this Court issue an Order authorizing ATI to issue and serve the attached subpoenas requiring defendant to produce such documents for ATI's use in presenting an accurate claim for damages to the Court in the default judgment prove-up. Those actual documents will be available for the Court at the time of the prove up so that the Court can consider the documents, if it so chooses, to confirm the fairness of ATI's damages claim.

(6) ATI requests this Court issue the order under F.R.C.P. Rule 26(d) authorizing it to conduct this limited discovery, through the attached subpoenas, prior to and without the need to confer further with the defendant as required under F.R.C.P. Rule 26(f). The subpoenas will not surprise the defendant or its President. The Court's Docket reveals: the Complaint was served personally on the President; the undersigned served all of the papers requesting entry of default on the defendant's outside counsel; the undersigned served the Court's Default Order on defendant's outside counsel; and we have served this request on defendant and its outside counsel.

(7) **In order to create no surprise**, the undersigned sent these document requests in writing to defendant's outside counsel on August 6, 2008 and stated the need for this minimal discovery by telephone and in writing as early as August 5, again on August 6 and on August 7. The written correspondence and the telephone calls are all set forth in the Declaration of Thomas W. Ferrell in support of the entry of default, dated and filed August 27, 2008. (Attached as **Exhibit C** to this Application. It is attached to the Court's Docket Document No. 7). The document request is not burdensome. The Defendant is in the business of selling goods with the "Infringing Certificate" to wholesale and retail customers and undoubtedly in the ordinary course of its business, keeps the information about sales and revenue in spreadsheet form or other equally accessible form.

WHEREFORE, ATI respectfully requests this Court enter an order authorizing service of the attached subpoenas, thereby permitting discovery under

Federal Rules of Civil Procedure Rule 26(d) and (f) prior to conferring formally with defendant ART AND FRAME MART CORPORATION, which has been defaulted by the Court.

DATED: August 27, 2008

HIGGS, FLETCHER & MACK LLP

By: /s/Thomas W. Ferrell
THOMAS W. FERRELL
Attorneys for Plaintiff
ATI INDUSTRIES, INC.

Issued by the

UNITED STATES DISTRICT COURT

Southern California

ATI Industries, Inc.

V.

Art and Frame Mart Corporation

SUBPOENA IN A CIVIL CASE

Case Number: [1] 08-CV-1296 IEG (RBB)

TO: Art and Frame Mart Corporation
521 Mountain Avenue, Unit E
Upland, California, 91786 (877) 322-2100

☐ YOU ARE COMMANDED to appear in the United States District court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

See Attachment "A."

PLACE	DATE AND TIME
Higgs, Fletcher & Mack, LLP,401 West "A" Street,Suite 2600, San Diego, CA 92101 -- But Art and Frame Mart Corp. is encouraged simply to deliver the documents by mail to this address.	September 22, 2008, 10:00 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rule of Civil Procedure 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Thomas W. Ferrell (signature) Attorneys for ATI INDUSTRIES, Inc.	August 29, 2008

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Thomas W. Ferrell, Higgs, Fletcher & Mack, LLP
401 West "A" Street, Suite 2600, San Diego, CA 92101, (619) 236-1551

(See Federal Rule of Civil Procedure 45 (c), (d), and (e), on next page)

[1] If action is pending in district other than district of issuance, state district under case number.

AO88 (Rev. 12/07) Subpoena in a Civil Case (Page 2)

PROOF OF SERVICE

	DATE	PLACE
SERVED		

SERVED ON (PRINT NAME) MANNER OF SERVICE

SERVED BY (PRINT NAME) TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on ______________________
DATE

____
SIGNATURE OF SERVER

____
ADDRESS OF SERVER

____

Federal Rule of Civil Procedure 45 (c), (d), and (e), as amended on December 1, 2007:

(c) PROTECTING A PERSON SUBJECT TO A SUBPOENA.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) DUTIES IN RESPONDING TO A SUBPOENA.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) CONTEMPT.

The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

ATTACHMENT "A" TO SUBPOENA
FOR ART AND FRAME MART CORPORATION

1. Documents sufficient to show the names, last known addresses, telephone numbers and e-mail addresses for all entities and persons who supplied the Infringing Certificate to Art and Frame Mart Corporation. The Infringing Certificate is pictured and identified in the First Amended Complaint in this action and is attached to this Subpoena.

2. Documents sufficient to show the names, last known addresses, telephone numbers and e-mail addresses for all entities and persons to whom Art and Frame Mart Corporation distributed, shipped or otherwise transferred an Infringing Certificate when it was attached to or accompanied a painting after July 20, 2005.

3. Documents sufficient to show per unit sales of paintings sold, shipped or transferred with the Infringing Certificate by Art and Frame Mart Corporation to each entity and person identified in paragraph (2) above.

4. Documents sufficient to show all revenue received from the sales, shipments or transfers of paintings identified in paragraph (3) above.

Certificate Authenticity

Certificate of Authenticity

This Certificate of Authenticity, confirms that this painting is an original oil painting. This painting was painted by one artist entirely by hand. This certificate officially establishes this painting as an Original Hand Painted Oil Painting

CERTIFICATE
Original
Hand Painted
Oil Painting
AUTHENTICITY

© 2004

AO88 (Rev. 12/07) Subpoena in a Civil Case

Issued by the

UNITED STATES DISTRICT COURT

Southern California

ATI Industries, Inc.

V.

Art and Frame Mart Corporation

SUBPOENA IN A CIVIL CASE

Case Number:[1] 08-CV-1296 IEG (RBB)

TO: JOSEF NAZAR, President of Art and Frame Mart Corporation
521 Mountain Avenue, Unit E
Upland, California, 91786 (877) 322-2100

☐ YOU ARE COMMANDED to appear in the United States District court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):
See Attachment "A."

PLACE	DATE AND TIME
Higgs, Fletcher & Mack, LLP,401 West "A" Street,Suite 2600, San Diego, CA 92101 -- But Art and Frame Mart Corp. is encouraged simply to deliver the documents by mail to this address.	September 22, 2008, 10:00 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rule of Civil Procedure 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
[signature] Attorneys for ATI INDUSTRIES, Inc.	August 29, 2008

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Thomas W. Ferrell, Higgs, Fletcher & Mack, LLP
401 West "A" Street, Suite 2600, San Diego, CA 92101, (619) 236-1551

(See Federal Rule of Civil Procedure 45 (c), (d), and (e), on next page)

[1] If action is pending in district other than district of issuance, state district under case number.

PROOF OF SERVICE

	DATE	PLACE
SERVED		

SERVED ON (PRINT NAME) MANNER OF SERVICE

SERVED BY (PRINT NAME) TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on ______________________
DATE

____
SIGNATURE OF SERVER

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ADDRESS OF SERVER

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Federal Rule of Civil Procedure 45 (c), (d), and (e), as amended on December 1, 2007:

(c) Protecting a Person Subject to a Subpoena.

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(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

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(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

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(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

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(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt.

The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

ATTACHMENT "A" TO SUBPOENA FOR ART AND FRAME MART CORPORATION

1. Documents sufficient to show the names, last known addresses, telephone numbers and e-mail addresses for all entities and persons who supplied the Infringing Certificate to Art and Frame Mart Corporation. The Infringing Certificate is pictured and identified in the First Amended Complaint in this action and is attached to this Subpoena.

2. Documents sufficient to show the names, last known addresses, telephone numbers and e-mail addresses for all entities and persons to whom Art and Frame Mart Corporation distributed, shipped or otherwise transferred an Infringing Certificate when it was attached to or accompanied a painting after July 20, 2005.

3. Documents sufficient to show per unit sales of paintings sold, shipped or transferred with the Infringing Certificate by Art and Frame Mart Corporation to each entity and person identified in paragraph (2) above.

4. Documents sufficient to show all revenue received from the sales, shipments or transfers of paintings identified in paragraph (3) above.

Certificate Authenticity

Certificate of Authenticity

This Certificate of Authenticity, confirms that this painting is an original oil painting. This painting was painted by one artist entirely by hand. This certificate officially establishes this painting as an Original Hand Painted Oil Painting

CERTIFICATE
Original Hand Painted Oil Painting
AUTHENTICITY

© 2004

MITCHELL B. DUBICK, ESQ. (Bar No. 101658)
dubick@higgslaw.com
THOMAS W. FERRELL, ESQ. (Bar No. 115605)
tferrell@higgslaw.com
HIGGS, FLETCHER & MACK LLP
401 West "A" Street, Suite 2600
San Diego, CA 92101-7913
TEL: 619.236.1551
FAX: 619.696.1410

Attorneys for Plaintiff
ATI INDUSTRIES, INC.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ATI INDUSTRIES, INC., Plaintiff, v. ART AND FRAME MART CORPORATION; DOES 1-10; and ROES 1-100, Defendants.	CASE NO. 08-CV-1296 IEG (RBB) **DECLARATION OF THOMAS W. FERRELL**

I, Thomas W. Ferrell, am above the age of 18 years and have personal knowledge of the facts stated in this document. I could and would testify competently to them.

1. I am the attorney of record for plaintiff, ATI INDUSTRIES, INC. ("ATI"), in this lawsuit.

2. I prepared the Complaint against defendant ART AND FRAME MART CORPORATION ("FRAME MART") (attached here as Exhibit "1" – Court Docket Document No. 1). The Summons and Complaint were personally served on FRAME MART, by delivery to its President at its headquarters in Upland, San Bernardino County, California, on July 21, 2008. (The Summons returned executed is attached under Exhibit "2." It is the Court Docket Document No. 4.)

///

3. To date, the defendant has not responded to the Complaint and no extension of time has been granted to the Defendant.

4. I prepared and caused to be filed the First Amended Complaint against FRAME MART which was filed on July 30, 2008 (First Amended Complaint attached under Exhibit "3." Court Docket Document No. 3.) The First Amended Complaint has an attached proof of service by mail indicating that the First Amended Complaint was addressed to Joseph Nazar (President), Art and Frame Mart Corporation at its corporate headquarters in Upland, California and was deposited with the U.S. Postal Service with the postage fully pre-paid at San Diego, California on July 30, 2008.

5. On Monday, August 4, 2008, I discussed ATI's Complaint against FRAME MART with Attorney Jeff LeBlanc who advised me that he and his colleagues were outside general counsel to FRAME MART. He assured me that all infringing activities by FRAME MART had ceased and he asked if the case could be settled. The next day on August 5, 2008, I wrote Mr. LeBlanc the facsimile that is attached under Exhibit "4" stating that Plaintiff, ATI:

> would like to resolve its injunctive and damages claims without unnecessary litigation expense. . . . Before we can begin to discuss damages for simple infringement, much less wilful infringement, we must have . . . (basic sales and revenue data to calculate infringing profits). . . . This is the fundamental damages discovery that can be provided immediately and very easily from your client's customer sales records. If your client will stipulate to a discovery order setting forth a time table for making these disclosures promptly, ATI would consider entering into a stipulated order temporarily relieving your client from responding to the Complaint. It would allow us to complete this basic discovery so that we can try to settle this lawsuit without expanding the pleadings or suing additional parties.

(August 5, 2008 facsimile to Jeff Blanc, attached as Exhibit "4.")

6. I wrote Mr. LeBlanc again on August 6, 2008 sending him a proposed Stipulation. The facsimile is attached under Exhibit "5" and states:

///

> ATI is willing to enter into the attached Stipulation that gives Art and Frame Mart an extension of time to respond to the Complaint to allow us to focus on the sales and damages information that we need to discuss settlement. Let me know if your client agrees to this extension of time and the informal discovery.

7. The Stipulation I proposed is attached as Exhibit "6."

8. The next day on August 7, 2008 I received another telephone call from Attorney LeBlanc. He told me that his office was not qualified to represent FRAME MART in this lawsuit. He said he and his colleagues were referring the matter to other counsel. I wrote Mr. LeBlanc the facsimile dated August 7, 2008 which is attached under Exhibit "7." In it I reminded Mr. LeBlanc, outside general counsel for FRAME MART:

> ATI is willing to move forward quickly toward settlement discussions with informal damages discovery under the Court's supervision. It is always my practice to be accommodating to attorneys when doing so does not disadvantage my clients. But we will not voluntarily delay moving this case along promptly without this type of stipulation, in light of Mr. Nazar's pattern of dismissing the seriousness of ATI's claims out of hand.

9. After August 7, 2008, I received no further communication from anyone representing FRAME MART until Tuesday, August 19, 2008. On that date, I spoke with Attorney David H. Ricks from Rancho Cucamonga, California who stated that he was being retained to represent FRAME MART in this lawsuit. He was under the impression that FRAME MART's response to the Complaint was due the next day, on August 20, 2008. I informed him that the date for responding to the First Amended Complaint was August 22, 2008. I urged him to read my correspondence with FRAME MART's outside general counsel and to read the Stipulation I proposed that would extend the defendant's answer date in exchange for court-supervised damages discovery. Mr. Rick told me that he would.

10. I have received no further contact from anyone acting on behalf of FRAME MART after August 19, 2008. FRAME MART has not responded to the

original Complaint or the First Amended Complaint. FRAME MART's deadline to answer or otherwise respond to the Complaint or First Amended Complaint was, at its latest – Friday, August 22, 2008.

11. The original Complaint and First Amended Complaint reveal that FRAME MART ignored ATI's verbal request in January 2008 that it cease its infringing conduct. FRAME MART also ignored the cease and desist letter delivered to its President on February 12, 2008 (The cease and desist letter with proof of delivery is Exhibit "C" to ATI's Complaint, which is Exhibit 1 to this Declaration). FRAME MART also ignored the original Complaint that was served personally on FRAME MART's President on July 21, 2008. During the week following personal service of the Complaint, FRAME MART continued to widely display and distribute the Infringing Certificate (that is the subject of this lawsuit) at a major home furnishings exhibition in Las Vegas, Nevada (See ATI's First Amended Complaint at ¶¶ 29-31, which is Exhibit "3" to this Declaration). Defendant has also ignored this Court's Summons.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on August 27, 2008, at San Diego, California.

Thomas W Ferrell

THOMAS W. FERRELL

RE: *ATI Industries, Inc. v. Art and Frame Mart Corporation, et al.*

VENUE: United States District Court – Southern District of California

CASE NO.: 08-CV-1296 IEG (RBB)

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is: 401 West A Street, Suite 2600, San Diego, CA 92101. On August 29, 2008, I served the within documents, with all exhibits (if any):

AMENDED EX PARTE APPLICATION FOR: (1) AUTHORITY TO SERVE SUBPOENA ON DEFAULTED DEFENDANT, RELIEVING PLAINTIFF OF ITS OBLIGATIONS UNDER F.R.C.P. 26(F)

☐ **(BY ELECTRONIC SERVICE)** I am familiar with the United States District Court, Southern District of California's practice for collecting and processing electronic filings. Under that practice, documents are electronically filed with the Court. The Court's CM/ECF system will generate a Notice of Electronic Filing (NEF) to the filing party, the assigned judge, and any registered users in the case. The NEF will constitute service of the document. Registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities.

☒ **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence by mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at San Diego, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **(BY OVERNIGHT MAIL)** Following ordinary business practices, I sealed the envelope and placed it for collection by Overnite Express today, and, in the ordinary course of business, the envelopes will be picked up today by Overnite Express for overnight delivery.

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I declare that I am employed in the offices of a member of this Court at whose direction the service was made.

Executed on August 29, 2008, at San Diego, California.

Lesli D. Miller
(Print Name)

(Signature)